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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 1/2018 concerning Pedro Zaragoza Fuentes and Pedro Zaragoza Delgado (Mexico)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 9 January 2018, the Working Group transmitted to the Government of Mexico a communication concerning Pedro Zaragoza Fuentes and Pedro Zaragoza Delgado. The Government replied to the communication on 12 March 2018. The State is a Party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

* In accordance with paragraph 5 of the Working Group's methods of work, José Antonio Guevara Bermúdez did not participate in the discussion of the present case.

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(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Pedro Zaragoza Fuentes and Pedro Zaragoza Delgado, father and son, are Mexican nationals, businessmen from the State of Chihuahua. They are partners in companies in which other members of their family are shareholders.

5. The source reports that a partner and relative of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado carried out a series of manoeuvres in an allegedly illegal attempt to take over a number of the business group's companies and subsidiary businesses. It is claimed that he used the criminal complaints process to push for economic gain, taking advantage of a practice provided for in the Constitution of Mexico — namely, the automatic use of pretrial detention for certain types of offence.

6. Father and son were accused of offences that, despite allegedly false and, in some aspects, non-existent evidence, were sufficiently serious to justify an order for automatic pretrial detention, as authorized under the Constitution and procedural law. A warrant for the arrest of the two men was thus issued and Mr. Zaragoza Delgado was placed in automatic pretrial detention, having been denied the opportunity, in accordance with article 20 of the former Constitution (article 19 of the current Constitution), of requesting a non-custodial alternative.

7. According to the source, the complaint of extortion was lodged with the Office of the State Attorney General of Sinaloa by the partner and relative of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado on 23 October 2015. On 14 December 2015, the complaint resulted in the issue of an arrest warrant by the Sixth Court of First Instance for Criminal Offences. The issue of the warrant, in turn, set the criminal proceedings in motion.

8. The source reports that the warrant for the arrest of Mr. Zaragoza Delgado was executed on 20 January 2016, and that he was arrested without having received prior notification of the criminal proceedings. A false address, in a place that was not his home, was used to issue the warrant, since he did not live in Sinaloa. At the time of his arrest, he was neither informed of the charges against him nor read or explained his rights under article 20 of the Constitution. He also had no opportunity to challenge his detention, as he was not brought before a judicial authority within 48 hours, as required by the Constitution.

9. The source contends that Mr. Zaragoza Delgado was subjected to cruel and inhuman treatment while being transported by land and by air from the Federal District — now Mexico City — to the State of Sinaloa, as he was handcuffed for more than 12 hours and held in isolation, unable to communicate with his family or lawyers.

10. According to the source, Mr. Zaragoza Delgado was detained for 56 days. The pretrial detention order had been issued automatically and he did not have the option of petitioning for a non-custodial alternative, as such alternatives were prohibited under the Constitution in cases like his. In the source's view, this prohibition is discriminatory, since it creates different classes of suspects: namely, suspects who may benefit from alternatives to pretrial detention and suspects who may not.

11. The source indicates that, since an arrest warrant had been issued against him for the same offences for which his son had been arrested, to avoid the looming prospect of being detained arbitrarily, Mr. Zaragoza Fuentes had no choice but to live — as he still lives — as a fugitive. The warrant was active for several months and is currently being contested, meaning that it could be reactivated at any time.

12. As a result of his son's arrest, Mr. Zaragoza Fuentes has himself been living in fear of the warrant's execution. According to the source, the entire criminal process has been manipulated and controlled, being used as a means of extortion to force Mr. Zaragoza

Fuentes into signing a financial agreement concerning the jointly owned companies with the relative who reported him in exchange for the release of his son and an end to the threat to his own freedom.

13. The source indicates that, although both arrest warrants were revoked after it was proven that the information and evidence on which they were based was false, the complainant and the Office of the State Attorney General have challenged the revocation. Thus, once this challenge is settled, the warrants could be used to justify his re-arrest. This threat of detention, it is argued, implies a potential infringement of liberty.

14. A core component of the source's claim is that, for certain offences, pretrial detention is the general rule rather than an exception, pursuant to article 19 of the Constitution. The automatic use of pretrial detention, as provided for in article 20 of the previous Constitution, which was in force at the time of the events, is still permitted, only now in article 19. This provision, according to the source, represents a constant threat to liberty of person in Mexico, as it permits arbitrary detention on a general basis. Such a threat, the source argues, is currently looming over Mr. Zaragoza Fuentes and his son, in addition to the detention which the latter has already endured.

15. According to the source, the constitutional framework stipulating automatic pretrial detention for persons accused of certain crimes turns the presumption of innocence, which is a basic safeguard in all criminal proceedings, into a presumption of guilt, as no consideration is given to the evidence or the possibility of alternatives to automatic detention. The criminal court responsible for the proceedings is prevented from analysing or otherwise considering the circumstances of the case.

16. The source notes that article 20 of the Constitution in force at the time of the events, which corresponds to article 19 of the current Constitution, prevents judges conducting criminal proceedings for certain offences from ruling on whether or not to release the defendants. Judges are under an obligation to deny alternatives to pretrial detention and, as a result, are forced to violate article 9 (3) of the Covenant, since the aforementioned constitutional provisions do not give them the discretion to consider any possibility other than automatic pretrial detention.

17. The source explains that, when a person is accused or apprehended, the judge hearing the case should explore all options before taking a decision as to whether a person's legal situation justifies continued liberty — that is, deciding whether to use non-custodial alternatives to detention to prevent the person from absconding or to allow the person to be tried without being deprived of his or her liberty, where so justified. Depriving judges of this possibility, in the source's view, is a limitation of their judicial powers, giving them no choice but to order pretrial detention.

18. The source contends that, by compelling judges to issue arrest warrants and detention orders on the strength of nothing more than an accusation, the legal framework makes it possible to use arbitrary detention as a means of extortion. This situation has spawned a widespread practice whereby people file false complaints and malicious accusations as a means to trigger arbitrary arrests and, through agreements that lead to the suspension of criminal proceedings, obtain money from the arrested person in exchange for his or her freedom.

19. The source argues that, in this case, a relative and business partner used false evidence to file a criminal complaint with the intention of placing Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado at a disadvantage and forcing them to sign an agreement to redistribute their companies' assets and shares. The criminal complaint was filed in Sinaloa — a state in which such practices are commonplace and the complainant had contacts among senior officials in the Office of the State Attorney General. These officials expedited the issue of the arrest warrants in order to encourage the "negotiation" of a settlement in which a payment would be made to eliminate the threat to Mr. Zaragoza Fuentes' liberty and secure the release of Mr. Zaragoza Delgado, who had been arrested and placed in pretrial detention.

20. The source submits that the present case falls within category I of the Working Group's categories of arbitrary detention, as the legal basis for Mr. Zaragoza Delgado's

detention is incompatible with international standards for liberty of person and the obligation to offer non-custodial alternatives that prevent detention from becoming the rule. In this respect, the source states that the provision of the Constitution is contrary to the international obligation, laid down in article 9 (3) of the Covenant, to ensure that pretrial detention is an exception rather than the general rule.

21. The source also submits that Mr. Zaragoza Delgado's detention was arbitrary under category III of the Working Group's categories of arbitrary detention, as the international norms relating to the right to a fair trial were not observed. The violation of the fundamental right to be presumed innocent, enshrined in article 14 (2) of the Covenant, is also highlighted in the communication; the source argues that detaining Mr. Zaragoza Delgado without proof of his guilt was a breach of the right of all persons charged with a criminal offence to be presumed innocent until proved guilty. The source makes the same argument with regard to the arrest warrants that are being challenged, as they are a constant threat to the liberty of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado, who have not had a fair trial culminating in a final judgment and conviction.

22. In addition, the source contends that this case also involves detention that is arbitrary under category V. The argument is that father and son are victims of discrimination, as, under the Constitution, given the offence of which they have been accused, they are not entitled to benefit from alternatives to detention. This situation has infringed their right to liberty of person without justification and, according to the source, is a violation of articles 3 and 26 of the Covenant.

Response from the Government

23. On 9 January 2018, the Working Group transmitted the source's arguments to the Government and requested detailed information on the situation of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado by 12 March 2018. The Working Group also asked the Government to clarify the factual and legal grounds for the detention of Mr. Zaragoza Delgado and to explain how his detention was compatible with the country's human rights obligations. The Government replied to the communication on 12 March 2018.

24. The Government confirmed that, on 23 October 2015, Mr. Zaragoza Fuentes' and Mr. Zaragoza Delgado's relative and business partner filed a complaint accusing them of extortion and that an investigation that involved the collection of evidence was initiated as a result. The Public Prosecution Service instituted criminal proceedings against Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado on 8 December 2015. The arrest warrants were issued on 14 December 2015. The warrant for the arrest of Mr. Zaragoza Delgado was executed on 20 January 2016.

25. The Government reports that the Mr. Zaragoza Delgado was transferred to Sinaloa, where the criminal proceedings against him were pending, and that he was placed in the Centre for the Enforcement of the Legal Consequences of Crime on 21 January 2016. He gave his initial statement on the same day, with the assistance of his lawyers. The defence team requested that the time period for the submission of evidence be doubled so, instead of having 72 hours, they were given 144 hours to collect and submit the evidence they considered relevant. On 26 January 2016, once the evidence had been submitted, Mr. Zaragoza Delgado was committed to custody. Indirect *amparo* proceedings were instituted to challenge the detention order.

26. The Government points out that, on 8 March 2016, Mr. Zaragoza Delgado filed a motion for release on grounds that the evidence against him was inadequate, and that his immediate release was ordered on 14 March 2016. The *amparo* proceedings were dismissed as a result, having been rendered without purpose. On 16 March 2016, Mr. Zaragoza Delgado's release due to insufficient evidence was challenged by the Public Prosecution Service. For the time being this challenge remains pending because of a change of judge.

27. Mr. Zaragoza Fuentes, for his part, filed an *amparo* petition before the warrant for his arrest was executed. This action concluded favourably. Mr. Zaragoza Fuentes made an appearance to make his statement and submit the evidence he considered relevant. Ultimately, for want of incriminating evidence, Mr. Zaragoza Fuentes was released. The release order was challenged by the Public Prosecution Service and the alleged victim's

lawyer. While the challenge to the order for Mr. Zaragoza Delgado's release is pending, the order for Mr. Zaragoza Fuentes' release has been confirmed without being contested by any of the parties.

28. The Government states that Mr. Zaragoza Delgado never complained to the authorities that he had been subjected to cruel and inhuman treatment or held incommunicado during his detention. Accordingly, the Government, not being apprised of the allegations to that effect, had no reason to undertake the relevant investigations. According to the Government, Mr. Zaragoza Delgado's failure to submit a complaint suggests that the allegations are untrue. The Government contends that at no time — either when he was arrested or while he was in detention — was Mr. Zaragoza Delgado subjected to cruel and inhuman treatment. On admission to the detention facility, he underwent a medical examination that found no signs of injury and he did not report that he had been subjected to cruel and inhuman treatment.

29. The Government notes that, despite the assertion to the contrary, the detention of Mr. Zaragoza Delgado was lawful under the applicable legislation. Under article 21 of the Constitution of Mexico, the Public Prosecution Service and the police have the power and the obligation to investigate any reported crime. In addition, article 16 of the Constitution states that arrest warrants may be issued only by a judicial authority and only after a criminal complaint has been submitted.

30. Mr. Zaragoza Delgado's detention was the result of the extortion complaint against him, which was backed up by evidence gathered during the investigation, including evidence sufficient to assume his probable criminal liability for the offence of extortion, as defined in article 231 of the Criminal Code of Sinaloa. The arrest of Mr. Zaragoza Delgado was thus based on an arrest warrant issued by the judicial authority. Since extortion is considered a serious crime, Mr. Zaragoza Delgado had to face trial while deprived of his liberty, as required by the Constitution.

31. Mr. Zaragoza Delgado was kept informed at all times of the charges against him. He was allowed an adequate defence, as shown by the appeals and *amparo* petitions he filed, not to mention the motion for release which put an end to his detention. Consequently, since the detention was ordered by the competent authority, with a court order and in accordance with the applicable Criminal Code, it was legal under Mexican law.

32. The Government explains that the detention was necessary and proportionate. Detaining Mr. Zaragoza Delgado was necessary because he was facing trial for extortion, which is considered by law a serious crime. Under article 18 of the Constitution, pretrial detention should be ordered in cases involving offences punishable by custodial sentences. Under article 117 of the Sinaloa Code of Criminal Procedure and in connection with article 231 of the Sinaloa Criminal Code, extortion is regarded as a serious crime, so, pursuant to article 18 of the Constitution, pretrial detention was ordered.

33. From the outset of his detention, Mr. Zaragoza Delgado was informed of the charges against him and of his right to an adequate defence; indeed, he appointed lawyers of his own choosing and challenged the orders concerning him, submitted exculpatory evidence and even filed a motion for release. The proceedings involving Mr. Zaragoza Delgado were conducted within the time periods required by law. After being arrested, for example, he was immediately transferred to Sinaloa, where, on the following day, his initial statement was taken.

34. Under article 18 of the Constitution, the place in which persons are detained while awaiting trial should be different from that in which they serve their sentences. Mr. Zaragoza Delgado was held in the Centre for the Enforcement of the Legal Consequences of Crime in a section reserved specifically for persons facing trial, and thus separately from convicted prisoners. Furthermore, he was also placed in a cell that was in good condition, in line with international standards.

35. In addition, the Government notes that his arrest was reviewed by the courts without delay. Immediately after he was arrested, and with the assistance of his lawyers, he gave an initial statement to the judge hearing the case. All proceedings could be reviewed without delay by the competent judicial authority. Excluding the time necessary to transfer Mr.

Zaragoza Delgado to Sinaloa, the time elapsed from his arrest to his appearance before a judge amounted to less than one day.

36. Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado also had access to a fair hearing. They were able to submit the evidence and lodge the appeals they considered relevant. In addition, both the Public Prosecution Service and the judge hearing the case acted with due diligence and dispatch throughout the proceedings. The appeals filed by Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado were resolved immediately and in their favour.

37. The Government states that the detention of Mr. Zaragoza Delgado and the warrant for Mr. Zaragoza Fuentes' arrest were not discriminatory, as no distinction, exclusion, restriction or preference redounded to their benefit or caused them harm. There is therefore no indication that there has been any nullification or impairment of the recognition, enjoyment or exercise of human rights.

38. The Government concludes that the detention of Mr. Zaragoza Delgado and the warrant for the arrest of Mr. Zaragoza Fuentes do not constitute arbitrary detention, as neither falls within any of the Working Group's five categories thereof.

Further comments from the source

39. On 13 March 2018, the Working Group transmitted the Government's response to the source for further comments, which were received on 20 March 2018.

40. According to the source, the individual communication is based on a structural problem in the Mexican Constitution and on the use of automatic pretrial detention, in violation of international standards, according to which such detention should be the exception rather than the rule. In its response, however, the Government focuses on the legality of the detention and the arrest warrants, failing to proffer any test of arbitrariness that might show such measures to be necessary, proportionate and reasonable. Mr. Zaragoza Delgado was arrested after a false report, and as a result he spent 56 days in pretrial detention. The fact that he was later released, after it was shown that the accusation was groundless, does not absolve the State of its international responsibility. These incidents have consequences in respect of legality and reparation that have not been acknowledged.

41. The source points out that the Government does not address the argument that a State with a domestic legal framework that allows automatic pretrial detention is in breach of its international obligations. In other words, the Government fails completely to respond to the core argument that, as stated by the Human Rights Committee in its general comment No. 35 on liberty and security of person, "detention in custody of persons awaiting trial shall be the exception rather than the rule" (para. 38). The provisions of article 20 of the Constitution, now article 19, are contrary to international standards and resulted in violations of the rights of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado.

42. According to the source, the idea that detention is arbitrary cannot be dismissed with a formalistic argument drawn from law. The source rejects the Government's assertion that no rights violation has been committed because the components of criminal proceedings were conducted as required.

43. In cases of deprivation of liberty, the mere existence of a law does not guarantee adherence to the principle of legality. Laws should specify key components and should not refer to vague or overly broad concepts such as public safety. The law applied in this case falls short of that requirement in that it refers to "serious crimes against national security, the free development of the person and public health, as determined by law". It is a collection of vague, ambiguous words that deliberately uses broad and imprecise justifications for automatic detention.

44. The source indicates that judges should be able to consider alternatives, such as bail and electronic bracelets, that would make pretrial detention unnecessary. For fear of breaking the law and being accused of malfeasance, however, and because of a legal and constitutional prohibition, judges cannot consider these alternatives. This restriction undermines the independence of the judiciary.

45. In the source's view, the detention of Mr. Zaragoza Delgado was neither necessary nor proportionate. The Government argued that pretrial detention was necessary because he was facing trial for extortion, an offence considered a serious offence under the law. This extremely generic argument does not demonstrate that detention was necessary. Owing to the generic nature of the provisions, a false accusation of a serious offence was all that was needed for automatic pretrial detention to be ordered. Alternatives to detention, or the possible risk to the proceedings posed by ordering such an alternative, were not considered before detention was ordered. Article 19 of the Constitution, on automatic pretrial detention, is incompatible with international human rights law, as it prevents State agents from fulfilling their obligation to explain, in the light of the principles of necessity, proportionality and minimal intervention, the reasons for any imprisonment orders.

46. According to the source, the Government is wrong to assert that Mr. Zaragoza Fuentes was not arrested because he filed an *amparo* petition. The source contends that it is untrue that the warrant for Mr. Zaragoza Fuentes' arrest was stayed while his petition was heard, as staying arrest warrants in cases of offences warranting automatic pretrial detention is prohibited by Mexican law, in article 166 of the *Amparo* Act to be exact. When a person is deprived of his or her liberty for offences for which pretrial detention is automatic, he or she must await trial in detention and may remain there for years without the trial coming to an end or a verdict being reached. The source stresses that automatic pretrial detention is so deeply entrenched in the local legal system that judges do not see it as a human rights violation. Indeed, in the indirect *amparo* proceedings (77/2016), Mr. Zaragoza Fuentes, starting on 22 January 2016, requested a stay of the arrest warrant to avoid being deprived of his liberty, but the request was denied. The source states that there is a structural problem in Mexico, as there is no expeditious and effective means of challenging human rights violations.

47. According to the source, it is wrong to assume that because no complaint was submitted there was no cruel and inhuman treatment. There is no effective means of defence which would have ensured Mr. Zaragoza Delgado's protection. The General Act on the Prevention, Investigation and Punishment of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment did not enter into force until 26 June 2017. The Government states that no complaint was lodged with the authorities, without specifying with which authorities a complaint could have been lodged. If the State is contending that domestic remedies have not been exhausted, it should not only assert as much, but should also indicate what remedies should have been exhausted and how effective they are. In addition, it is unreasonable to expect Mr. Zaragoza Delgado to have filed a complaint against his captors and jailers no more than a few hours after having been arrested and while his life, liberty and bodily integrity were under threat. Nor could he file a complaint during the 56 days for which he was detained, for fear of threats to his safety.

48. According to the source, there is no effective means of contesting arbitrary detention or determining whether a person was subjected to torture or ill-treatment. While indirect *amparo* proceedings are available, in this case the proceedings were automatically terminated once the judge ruled on the legal situation: there was no opportunity to explore the legality of the detention and the arrest warrant before the proceedings were dismissed. Thus, *amparo* proceedings are not a simple, rapid and effective means of challenging human rights violations.

Discussion

49. The Working Group thanks the source and the Government for their submissions. It appreciates their cooperation and the commitment they have shown throughout the consideration of the case.

50. The Working Group is of the view that the Government's reply confirms some of the source's allegations, including the undisputed fact that a family member of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado accused them of extortion and that, as a result, on 14 December 2015 warrants were issued for their arrest. Mr. Zaragoza Delgado was arrested on 20 January 2016 and held in the State of Sinaloa. He was placed in automatic pretrial detention on 26 January 2016 and remained in detention until his legal challenge succeeded. He was released on 14 March 2016.

Current situation of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado

51. The Working Group notes that Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado are not currently deprived of their liberty. Arrest warrants were issued against both men on charges of extortion, but in Mr. Zaragoza Fuentes' case the warrant was not executed and he was not detained. The Government indicates that this is due to the fact that Mr. Zaragoza Fuentes successfully petitioned for *amparo* against the arrest warrant before it was executed. According to the Government, an appeal against the *amparo* order lodged by the Prosecution Service and the plaintiff's counsel was decided in Mr. Zaragoza Fuentes' favour on 31 January 2018. The Government leaves open the possibility that the arrest warrant against Mr. Zaragoza Fuentes could be reactivated; since neither of the two parties have appealed the ruling in his favour of 31 January 2018, the ruling could presumably be challenged in future.

52. The source gives a different account of Mr. Zaragoza Fuentes' situation, indicating that he has been living in hiding under constant threat of being detained like his son, since the arrest warrant against him was issued on the basis of the same false allegations and could be reactivated at any time. The source states that, contrary to the Government's version of events, Mr. Zaragoza Fuentes did not remain at liberty because of the *amparo* action or the suspension of his trial. Pursuant to article 166 of the *Amparo* Act, *amparo* is not available to persons subject to an arrest warrant for offences that require automatic pretrial detention. The source claims that the indirect *amparo* petition against the warrant for Mr. Zaragoza Fuentes' arrest was denied.

53. Notwithstanding the facts in issue, it is clear to the Working Group that Mr. Zaragoza Fuentes remains at risk, as the warrant for his arrest could be reactivated and he could be taken into custody. However, as the Working Group has clarified, its methods of work do not provide a mechanism for addressing situations in which there is sufficient evidence that the execution of an arrest warrant will inevitably result in arbitrary deprivation of liberty. In effect, the Working Group currently has to wait until the arrest warrant is executed and the person is arbitrarily deprived of his or her liberty.[1] Therefore, while it seems likely that Mr. Zaragoza Fuentes could be detained and placed in automatic pretrial detention if the arrest warrant is reactivated, it is not within the Working Group's mandate to address this situation until the arbitrary deprivation of liberty actually occurs. If the arrest warrant is reactivated and the proceedings against him continue, resulting in Mr. Zaragoza Fuentes' detention, the Working Group will have a mandate to offer an opinion as to whether or not the detention is lawful and was carried out in compliance with the relevant provisions of international human rights law. However, in light of the conclusions reached below, the Working Group urges the Government to terminate the proceedings against Mr. Zaragoza Fuentes.

54. Mr. Zaragoza Delgado's situation is different from his father's. Mr. Zaragoza Delgado was deprived of his liberty and placed in automatic pretrial detention for a period of 56 days following the execution of a warrant for his arrest on 20 January 2016. The Working Group notes that, like his father, Mr. Zaragoza Delgado is in danger of being arrested again at any time. According to the Government, the order that led to Mr. Zaragoza Delgado's release on 14 March 2016 was challenged by the Prosecution Service on 16 March 2016 and the appeal is currently stayed because of a change in the judge hearing the case. Given that the appeal was lodged by the Attorney General's Office over two years ago, it seems extraordinary that it has not been resolved, for example, by appointing another judge. This is particularly surprising given that, as the Government has pointed out, the initial investigation, arrest and detention of Mr. Zaragoza Delgado were carried out expeditiously. Given these circumstances, the Working Group urges the Government to terminate the current proceedings against Mr. Zaragoza Delgado without delay and to suspend any further action.

[1] See A/HRC/30/36, paras. 52–56. The Working Group proposed a preventive mechanism in the annual report referred to, but was never given a mandate to implement it either by way of a review of its methods of work or by adoption by the Human Rights Council.

55. The Working Group recognizes that Mr. Zaragoza Delgado is not currently in detention. Pursuant to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion, on a case-by-case basis, on whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. The Working Group believes that it is important to render an opinion, since the case involves allegations that the provisions of the Mexican Constitution fail to comply with international standards inasmuch as they allow for mandatory pretrial detention for certain criminal offences.

Deprivation of liberty under category I

56. In determining whether the deprivation of liberty of Mr. Zaragoza Delgado was arbitrary, the Working Group had regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case of violations of international standards constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). The Government can meet this burden of proof by producing documentary evidence in support of its claims.[2] Mere assertions that lawful procedures have been followed are not sufficient to rebut the source's allegations (ibid. para. 68).

57. The source alleges multiple violations of Mr. Zaragoza Delgado's procedural rights in the context of his arrest on 20 January 2016. These include the claim that Mr. Zaragoza Delgado was detained without being informed of the charges against him. An allegedly fake address was used to obtain a warrant for his arrest in a place other than his domicile, since he does not live in Sinaloa. He was neither informed of the charges, nor were his rights explained to him at the time of his arrest, as required under article 20 of the Constitution. Moreover, Mr. Zaragoza Delgado was not given the opportunity to challenge his arrest immediately, because he was not brought before a competent judicial authority within 48 hours of his arrest.

58. In its response, the Government stated that Mr. Zaragoza Delgado was informed of the charges against him at the time of his arrest. The Government also pointed out that Mr. Zaragoza Delgado was informed of his right to adequate legal representation and brought before a competent judicial authority the day following his arrest. However, the Government did not provide any evidence substantiating these assertions.

59. In the absence of evidence provided by the Government, the Working Group considers that the source has established a credible prima facie case that violations occurred. Pursuant to article 9 (1) of the Covenant, no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law. In the present case, the authorities failed to comply with the procedures set forth in domestic legislation, including the requirement to explain to Mr. Zaragoza Delgado his rights under Mexican law. Moreover, the authorities apparently failed to inform him of the reasons for his arrest and to provide timely notification of the charges against him, in violation of article 9 (2) of the Covenant.[3] The authorities did not bring Mr. Zaragoza Delgado before a court within the time limit prescribed by domestic legislation, in violation of the rights set

[2] See opinion No. 41/2013 (Libya) which recognizes that the author of a communication and the Government do not always have equal access to the evidence and frequently the State party alone has the relevant information. In this case, the Working Group recalls that "where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is generally able to 'demonstrate that it has followed the appropriate procedures and applied the guarantees required by law … by producing documentary evidence of the actions that were carried out'" (para. 27). Also see International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, merits, judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 55.

[3] See opinion No. 23/2017, para. 23, in which the Working Group established that the Mexican authorities failed to give the reasons for arrest immediately at the time of arrest and to provide timely notification of the charges, in violation of article 9 (2) of the Covenant, falling within category I. Also see opinion No. 10/2015, para. 34.

forth in article 9 (3) of the Covenant.[4] The Working Group has established that judicial oversight of the legality of detention is essential to ensure that any deprivation of liberty has a legal basis.[5] The Working Group concludes that the arrest and detention of Mr. Zaragoza Delgado were conducted in violation of domestic due process rules and without a legal basis and that his detention is therefore arbitrary, falling within category I. In addition, as will be discussed below, the Working Group considers that the constitutional provision on which Mr. Zaragoza Delgado's detention was based, namely the provision requiring automatic pretrial detention for certain offences, is contrary to article 9 (3) of the Covenant. This reaffirms the conclusion that he was detained unlawfully.

60. In reaching this conclusion, the Working Group took account of the Government's claim that Mr. Zaragoza Delgado's detention was lawful because his arrest was carried out in accordance with Mexican law. That is to say, Mr. Zaragoza Delgado's arrest was mandated by a competent authority, executed in compliance with a judicial order and based on a criminal offence established in the Criminal Code in force at the time of the events, which qualified extortion as a serious offence requiring automatic pretrial detention. However, as the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law (see, for example, opinions Nos. 79/2017, 42/2012 and 46/2011).

Deprivation of liberty under category III

61. The source's central argument is based on the fact that mandatory pretrial detention breaches article 9 (3) of the Covenant, which provides that detention while awaiting trial should be an exception, not the rule. According to the source, Mr. Zaragoza Delgado was placed in automatic pretrial detention under a provision of the Constitution (the former article 20) applicable at the time to the offence for which he was charged which required automatic pretrial detention for certain offences, including extortion. According to the source, article 20 provided that in every criminal trial the accused person and the victim or injured party should enjoy the following guarantees: A. The accused person: I. At the request of [the accused], the judge shall immediately grant release on bail, provided that the alleged offence is not of such gravity that the law expressly prohibits this benefit.[6] The source stresses that the mandatory pretrial detention mechanism for certain offences remains in force under article 19 of the Constitution.[7]

62. In its response, the Government stated that Mr. Zaragoza Delgado's detention was in compliance with the provisions of article 9 (3) of the Covenant, because it was implemented in accordance with domestic legislation, was necessary and proportionate, and was considered by the courts without delay. The Government did not specifically contest the source's argument that automatic pretrial detention constitutes a breach of article 9 (3) on the exceptional nature of pretrial detention. The Government does, however, refer to a case brought before the Human Rights Committee, in which the Committee found no violation of article 9 (3), as a competent district court had determined that it was necessary

[4] According to the Human Rights Committee, a period of 48 hours is ordinarily sufficient to transport the individual and to prepare him or her for the judicial hearing; any delay longer than 48 hours must be absolutely exceptional and be justified by the circumstances. Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and these limits should also not be exceeded. See general comment No. 35 (2014), para. 33.

[5] See, for example, opinion No. 66/2017, para. 64. Also see opinions Nos. 46/2017 and 45/2017.

[6] The source indicates that article 117 of the Code of Criminal Procedure of the state of Sinaloa includes extortion in a long list of serious offences for which bail should not be granted.

[7] According to the source, article 19 of the Constitution requires that the judge routinely order pretrial detention for cases of organized crime, wilful homicide, rape, kidnapping, trafficking in persons, violent crimes involving the use of weapons or explosives, as well as serious criminal offences *against national security, the free development* of the person and public health, as determined by law.

to place the accused in pretrial detention because he had been charged with a particularly serious offence.[8]

63. The Working Group is of the view that the former article 20 and the current article 19 of the Constitution violate article 9 (3) of the Covenant, which requires that pretrial detention should be an exception rather than the rule. The Working Group has reached similar conclusions in its earlier jurisprudence,[9] emphasizing that pretrial detention constitutes a grave limitation of freedom of movement, which is a fundamental and universal human right. It follows that, in the interests of justice, liberty should be recognized as a general principle or rule, and detention as an exception.[10] In addition, the Working Group underlines the principles established by the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person: "It should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of its necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case" (para. 38).

64. Furthermore, the Working Group considers that the requirement of automatic pretrial detention deprives the detainee of his right to seek alternatives to imprisonment, such as bail, in violation of the right to be presumed innocent until proven guilty under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. The imposition of automatic pretrial detention for certain offences nullifies the presumption of innocence, since persons accused of such offences are automatically detained without a balanced consideration of the restrictive measures other than deprivation of liberty that may be used as alternatives to imprisonment. The Working Group wishes to emphasize that international rules, in particular article 9 (3) of the Covenant, do not preclude the imposition of pretrial detention for serious offences. However, these rules require that such detention be only imposed after a judicial authority has conducted an individualized review of the situation in question, taking into account the rule contained in article 9 (3) of the Covenant. The Working Group notes that article 19 of the current Constitution requires that judges impose automatic pretrial detention in cases of "serious criminal offences against national security, the free development of the person and public health, as determined by law". The Working Group considers that this requirement is too broad, and contrary to the provisions of article 9 (3), to which the Human Rights Committee makes reference when stating that the relevant factors to determine whether detention pending trial is reasonable and necessary should not include vague and expansive standards such as "public security".

65. The Working Group calls on the Mexican Government to repeal this constitutional rule and the legislation that imposes automatic pretrial detention or, at least, to modify it in line with article 9 (3) of the Covenant. The decision to impose automatic pretrial detention must be left to the discretion of the judge, based on an individualized case-by-case decision. The conclusion reached by the Working Group in regard to this issue is in line with concern within the international community about the arbitrary and prolonged use of pretrial detention in Mexico and the failure to use alternatives to detention that do not involve deprivation of liberty. This concern was reflected in several of the recommendations

[8] See *Munarbek Torobekov v. Kyrgyzstan* (CCPR/C/203/D/1547/2007) para. 6 (3). However, in this case, pretrial detention was not mandatory or routinely or automatically ordered. Instead, the court conducted an individualized assessment of the necessity of detention, which included the defendant's previous conviction and the risk of his absconding if released (paras. 2 (13) and 6 (3)).

[9] See opinions Nos. 24/2015 and 57/2014.

[10] See A/HRC/19/57, paras. 48–58.

contained in the 2013 report of the Working Group on the Universal Periodic Review of Mexico.[41]

66. The Working Group considers that automatic pretrial detention deprives the judicial authority of one of its sequential functions as an independent court, i.e. to conduct an individualized case-by-case assessment of the necessity and reasonableness of detention. Owing to the impact of the constitutional rule on the independence of the judiciary in the present case, and taking note of the source's submission concerning the fact that the complaint was submitted in the state of Sinaloa because the complainant had close personal links to top officials, including contacts in the Office of the State Attorney General, the Working Group has decided to refer the present case to the Special Rapporteur on the independence of judges and lawyers.

67. The Working Group concludes that the violation of the right to a fair trial in the present case was of such gravity as to give Mr. Zaragoza Delgado's deprivation of liberty an arbitrary character, falling within category III.

Deprivation of liberty falling within category V

68. The source claims that Mr. Zaragoza Delgado has been subject to discriminatory treatment falling under category V, that is, that the constitutional provisions applied in this case prevented Mr. Zaragoza Delgado from benefitting from alternatives to detention, in violation of his right to equality before the law and non-discrimination under articles 3 and 26 of the Covenant. According to the source, there are effectively two categories of accused: those charged with offences that do not automatically require detention, who can benefit from non-custodial alternatives such as bail, and those who, like Mr. Zaragoza Delgado, are charged with criminal offences that preclude the use of such alternatives. The source argues that it was Mr. Zaragoza Delgado's status as a person accused of a certain criminal offence that prohibited the use of alternative measures to imprisonment and served as a basis for discrimination. In its reply, the Government contends that, according to the criteria applied by the Human Rights Committee, Mr. Zaragoza Delgado was not subject to any distinction, exclusion, restriction or preference which had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of his rights.

69. The Working Group notes that the criteria established for category V of its methods of work are not the same as those applied by the Human Rights Committee. Category V simply requires that the deprivation of liberty aims towards or can result in "ignoring the equality of human beings". The Working Group is convinced that this requirement is met in the present case, since article 20, now article 19, of the Constitution draws a distinction between persons who may apply for alternatives to imprisonment and those who may not, thereby ignoring the equality of human beings. The Working Group considers that the distinction drawn between Mr. Zaragoza Delgado and other individuals who may be charged with offences that are not subject to automatic pretrial detention was based on a "different status", which constitutes unlawful discrimination under articles 2 (1) and 26 of the Covenant. Therefore, the Working Group considers that the facts reveal a violation falling within category V.

70. The Working Group also recalls that article 26 of the Covenant not only prohibits discrimination, but also provides that all persons are equal before the law and are entitled to equal protection of the law. As recognized by the Human Rights Committee, article 26 does not merely duplicate the guarantees provided for in the Covenant, but provides in itself an autonomous right.[42] In the present case, if it had not been for the constitutional provisions, Mr. Zaragoza Delgado could have exercised his right to apply for the alternative measures to detention available to others, like anyone else, through an individual assessment of his case. As he was unable to do so, he was detained automatically. This constitutes a violation of his right to equality before the law and equal protection by the law within the meaning of article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant, and, as a result, his case falls within category II. The Working Group is of the view that category

[41] See A/HRC/25/7, paras. 148 (17), 148 (52), 148 (61), 148 (62) and 148 (64).

[42] See general comment No. 18 (1989) on non-discrimination, para. 12.

II applies to detention resulting from the exercise of one or several of the rights set forth in this category, as well as detention resulting from a person being prevented from exercising these rights, since both situations may lead to a person being arbitrarily deprived of their liberty.

Conclusions

71. The Working Group considers that Mr. Zaragoza Delgado was not awarded compensation for the arbitrary deprivation of his liberty, in violation of article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. According to the Government, Mr. Zaragoza Delgado successfully applied for an order ("motion for release for lack of evidence") that led to his release on 14 March 2016. As a result of this order, his application for *amparo* was dismissed and Mr. Zaragoza Delgado did not receive a formal acknowledgement that his detention was arbitrary. For this reason, he is entitled to compensation. The source has credibly argued that *amparo* proceedings are ineffective, because a person's release puts an end to the proceedings and prevents a more detailed analysis of the unlawful nature of the detention. The Working Group therefore urges the Government to undertake the necessary legal reforms to establish an effective remedy for human rights violations, including arbitrary detention.

72. In addition, the Working Group wishes to express its concern with respect to the source's allegations that Mr. Zaragoza Delgado was subjected to cruel and inhuman treatment during his land and air transportation from Mexico City to the State of Sinaloa. According to the source, this included being handcuffed for more than 12 hours and subsequently held in isolation without the possibility of communicating with his family or lawyers, which would seem to constitute temporary enforced disappearance or, at least, a period of incommunicado detention. The Government denies these allegations vehemently and points out that Mr. Zaragoza Delgado did not raise this issue with the judicial authorities in Mexico. The Government also refers to a medical examination of Mr. Zaragoza Delgado conducted on his admission to the Sinaloa detention centre in which no evidence of ill-treatment was found, although it failed to provide a copy of the medical examination report. The Government also indicates that, at the time he was placed in detention at the Sinaloa centre, Mr. Zaragoza Delgado did not complain of ill-treatment by the officials who arrested him. In reply to the Government's observations, the source asserts that there was no effective mechanism for seeking protection against ill-treatment in Mexico, since the anti-torture legislation was not in force at the time of the alleged offences and, in any event, it was not feasible for Mr. Zaragoza Delgado to submit a complaint while in custody, subject to pressure and threats to his life, liberty and physical integrity. The Working Groups refers the present case for further consideration to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

73. This is one of several cases concerning arbitrary deprivation of liberty in Mexico submitted to the Working Group in the past five years.[13] The Working Group is concerned that this may reflect a systemic problem of arbitrary detention in Mexico which, if it continues, may constitute a serious violation of international law. The Working Group recalls that, under certain conditions, widespread or systemic imprisonment or other serious forms of deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.[14]

74. The Working Group would welcome the opportunity to conduct a visit to Mexico to work constructively with the Government in order to address its concerns relating to arbitrary deprivation of liberty. Given that a considerable time period has elapsed since its last visit to Mexico, in November 2002, the Working Group deems it an opportune moment to continue its dialogue with the Government by way of another country visit. The Working Group notes that, in March 2001, the Government extended a standing invitation to all thematic special procedures mandate holders and therefore looks forward to a positive

[13] See, for example, opinions Nos. 66/2017, 65/2017, 24/2017, 23/2017, 58/2016, 17/2016, 56/2015, 55/2015, 19/2015, 18/2015, 23/2014 and 21/2013.

[14] See, for example, opinion No. 47/2012, para. 22.

response from the Government to its requests to visit, sent in April 2015, August 2016 and, most recently, in February 2018.

75. As a current member of the Human Rights Council, it would be advisable for the Government to extend an invitation to the Working Group to conduct an official visit to Mexico. The fact that Mexico's human rights record will be subject to review during the third cycle of the universal periodic review in November 2018 also provides an opportunity for the Government to improve its cooperation with the special procedures and bring its legislation into line with international human rights law.

Disposition

76. In light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Pedro Zaragoza Delgado, being in contravention of articles 2, 7, 8, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and of articles 2 (1) and (3), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary within the meaning of categories I, II, III and V.

77. The Working Group requests the Government to take the steps necessary to remedy Mr. Zaragoza Delgado's situation without delay and bring it into conformity the relevant international standards, including those set out in the Covenant and in the Universal Declaration of Human Rights.

78. The Working Group, taking into account all the circumstances of the case, considers that the appropriate remedy would be to accord Mr. Zaragoza Delgado an enforceable right to compensation and other reparations, in accordance with international law. The Working Group urges the Government to terminate the proceedings against Mr. Zaragoza Delgado immediately.

79. The Working Group takes note of the interpretive statement made by Mexico regarding article 9 (5) of the Covenant, which states that: "Under the Political Constitution of the United Mexican States and the relevant implementing legislation, every individual enjoys the guarantees relating to penal matters embodied therein, and consequently no person may be unlawfully arrested or detained. However, if by reason of false accusation or complaint any individual suffers an infringement of his basic right, he has, inter alia, under the provisions of the appropriate laws, an enforceable right to just compensation".[15] The Working Group considers that this statement provides additional grounds for compensation under the State party's legislation.

80. The Working Group urges the Government to conduct a full and independent investigation into the circumstances surrounding Mr. Zaragoza Delgado's arbitrary detention, including the allegations of cruel and inhuman treatment, and to take appropriate measures against those responsible for the violation of his rights.

81. The Working Group encourages the Government to bring its legislation, including, in particular, article 19 of the Constitution, into line with the recommendations made in the present opinion and with the obligations assumed by Mexico under international human rights law.

82. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Follow-up procedure

83. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

[15] See *Multilateral Treaties Deposited with the Secretary General*, chap. IV (4).

(a) Whether compensation or other reparations have been made to Mr. Zaragoza Delgado;

(b) Whether an investigation has been conducted into the violation of Mr. Zaragoza Delgado's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Mexico with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

84. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

85. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

86. The Government should disseminate the present opinion among all stakeholders through all available means.

87. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps taken.[16]

[*Adopted on 17 April 2018*]

[16] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 2/2018 concerning Haritos Mahmadali Rahmonovich Hayit (Tajikistan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 6 December 2017 the Working Group transmitted to the Government of Tajikistan a communication concerning Haritos Mahmadali Rahmonovich Hayit. The Government did not reply to the communication in a timely manner. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Hayit is a Tajik citizen who was born in 1957 in the Rudaki District of Tajikistan.

5. The source reports that Mr. Hayit has been a prominent member of the Islamic Renaissance Party since its inception in 1999, and had formerly served as its Deputy Chairman. As an outspoken advocate against the administration of President Rahmon, he was subjected to systematic surveillance and pressure from the Tajik authorities, who visited his home regularly and inquired about his whereabouts. In April 2013, he was reportedly beaten by persons believed to be government agents.

6. The source reports that, in September 2015, the Government of Tajikistan intensified its intimidation and harassment of Party members by shutting down the Party and all of its operations. That same month, the Government allegedly used a failed coup led by Deputy Defence Minister General Abduhalim Nazarzoda as justification for cracking down on Party members. In particular, the authorities blamed the Party for the violent protest that took place on 4 September 2015 and resulted in 39 deaths, of which 14 were law enforcement officers.

Arrest and detention

7. According to the source, it was in the context of the 4 September protest that Mr. Hayit was arrested outside his home in Dushanbe on 16 September 2015. He was reportedly beaten upon arrest and held at an interrogation facility. Officers also conducted a search of his home without a warrant.

8. The source reports that the Government simultaneously arrested 12 other Islamic Renaissance Party political leaders. Mr. Hayit and the other Party leaders were jointly tried for alleged extremist activities and for alleged participation in the coup. Mr. Hayit remained in detention throughout the period before the trial and was reportedly routinely beaten and interrogated during that time. The torture that he sustained resulted in broken bones and long-term injuries.

9. Mr. Hayit was reportedly not brought before a judge until three days after his arrest, and was deprived access to a lawyer until 10 days after his arrest. His meetings with a lawyer — of which there were only five or six prior to the trial — were always supervised by Government agents. In addition, the lawyers of Mr. Hayit were only given access to the Government's criminal complaint less than 16 days prior to the trial and were denied access to much of the evidence that the Government deemed classified. The Government also reportedly harassed the lawyers representing the Party members, including jailing or driving into exile several defence counsels.

10. According to the source, Mr. Hayit was charged with murder, terrorism and "forcible" actions against the regime under numerous articles of the Criminal Code of Tajikistan, namely: article 32, part 3; article 104, part 2 (a) (b) (g) (h) (i) (k) (l) and (n); article 131, part 3 (a); article 170; article 179, part 3 (a); article 187, parts 1 and 2; article 189, part 3 (a); article 195, part 3; article 199, part 4 (a) (b) and (c); article 306; article 307, parts 1 and 3; article 309, part 2 (b); and article 313. His trial began on 9 February 2016.

Trial proceedings

11. According to the source, the court that heard the case of Mr. Hayit was unique. It was not a standard civilian-led trial, but was instead led by the Chief Military Judge, even though Mr. Hayit was not in military service. Mr. Hayit and his co-defendants were tried behind closed doors, and not in a public trial, which the Government justified on the basis of the supposedly "classified" nature of the proceedings. Immediately prior to being presented in court, the co-defendants from the Party were forced to run to the courthouse while chained together, causing them to fall over and sustain injuries.

12. The trial reportedly lasted several months. According to the source, at least two witnesses were coerced into giving testimony and others declared without any factual

support that Mr. Hayit had harboured extremist ideas. One witness recanted his testimony, claiming government coercion. The evidence presented by the prosecution lacked specific factual details. In addition, the defence was limited in its ability to examine the criminal complaint or the Government's evidence and was denied the opportunity to present its own expert witnesses, effectively destroying its ability to present a case for the defence of Mr. Hayit.

13. On 2 June 2016, the court rendered its verdict, and Mr. Hayit was convicted and sentenced to life imprisonment. His co-defendants similarly were sentenced to a range of punishments.

14. According to the source, neither the court nor the Government ever publicly announced the final verdict against Mr. Hayit and his co-defendants. Rather, it was leaked to the public shortly after it was issued. The focus of the court's verdict was not on evidence of any wrongdoing by Mr. Hayit or his co-defendants. Instead, the court emphasized an unpublished (and unfinished) article that Mr. Hayit had allegedly wrote, entitled "The Position of Islam in Our Life", which had allegedly been seized during a search of his home and which "specialists of the Ministry of Education and Science of the Republic of Tajikistan and the Committee for Religious Affairs and Supervision of Traditions and National Celebrations of the Government of the Republic of Tajikistan" had concluded constituted a condemnation of civil society in Tajikistan. The court reportedly gave no weight to the evidence presented by the defence.

15. The source reports that Mr. Hayit's subsequent appeal to the Tajikistan Supreme Court, presided by judges who were reportedly subordinates of the Chief Judge who had also presided over his trial, failed. The opinion of the Supreme Court contained limited information about the proceedings in the trial court, but confirmed that the trial court had accepted in their entirety the allegations of the Government against Mr. Hayit.

16. According to the source, Mr. Hayit is unable to pursue a cassation appeal in the Supreme Court of Tajikistan and no other appeal avenues are available to him. He is currently being held in long-term solitary confinement in Tajikistan Prison No. 1, which is located on Mirzo Tursunzoda Street in Dushanbe. Mr. Hayit has reportedly been severely injured while in prison and has been denied medical care.

Legal analysis

17. The source asserts that the detention of Mr. Hayit constitutes an arbitrary deprivation of his liberty under categories I, II and III.

Violation of category I: lack of legal basis for detention

18. The source submits that the detention of Mr. Hayit is arbitrary under category I as the Tajik authorities lack a legal basis for continuing to detain him.

19. According to the source, the Government of Tajikistan violated article 9 (2) and (3) of the Covenant by denying Mr. Hayit his rights to be informed of the charges against him at the time of arrest and to be brought promptly before a judge. He was initially held incommunicado and was not informed of the charges against him. He was held for three days without access to judicial review of his detention, and for 10 days without communication with the outside world, which are contrary to the requirements of article 9 of the Covenant for a lawful detention.

20. The source submits that the Government also violated article 15 (1) of the Covenant and article 11 (2) of the Universal Declaration of Human Rights, both of which purport to guarantee individuals the right to know what the law is and what conduct violates the law. The source asserts that the Criminal Code of Tajikistan defines criminal acts in a manner that is overly broad and that Mr. Hayit was convicted under imprecisely worded provisions of that Code that are impermissibly vague.

21. The source also submits that the Government failed to support the conviction of Mr. Hayit with substantive evidence and that it presented evidence gleaned in an illegal manner, thus violating article 9 (1) of the Covenant.

Violation of category II: substantive fundamental rights

22. The source submits that the detention of Mr. Hayit is arbitrary under category II because the Government detained him for having exercised his rights to freedom of opinion and expression, association and political participation, in violation of articles 19, 21, 22 and 25 of the Covenant, articles 19, 20 and 21 of the Universal Declaration of Human Rights, as well as articles 27 and 28 of the Tajik Constitution.

23. According to the source, the repeated attempts by the Government to silence Mr. Hayit through violence and intimidation, the speech-related arguments set forth by the Government at trial and the Government's pattern of harassing critical voices are all evidence that the conviction of Mr. Hayit was in retaliation for his dissent. Prior to his arrest, he had been subjected to intense surveillance and at least one brutal attack. At his trial, the Government alleged that he had written an inflammatory article and had disseminated information inciting religious and political hatred and discord. However, according to the source, the article had not advocated violence and was therefore neither a threat to national security or public order, health or morals. The source also alleges that Mr. Hayit's detention fits in with a larger trend by the Government of arresting or harassing opposition party members, journalists and other critical voices. The source notes that Mr. Hayit's political expression and criticism of the Government is protected expression and the Government has failed to show that his expression had advocated violence or had otherwise demonstrated a specific threat to security or public order.

24. The source also submits that Mr. Hayit was targeted because of his association with the Islamic Renaissance Party. In that respect, the source submits the following elements: (a) the Government's history of persecution of Mr. Hayit for his work with the Party; (b) the fact that one of the charges levelled against him explicitly criminalized his association with the Party on the grounds of conspiracy; (c) the focus of the interrogation of Mr. Hayit on the alleged criminal intent of the Party as an organization; (d) the joint trial of 13 Party members, convicted without any substantiating evidence; and (f) the wider context of repression against the Party as a whole, including banning the organization and attacking attorneys who defended its members. The source asserts that the above elements demonstrate that the arrest, detention and conviction of Mr. Hayit were partly driven by his mere association with the Party.

25. The source notes that, although the rights to free expression and free association may be restricted as necessary for the protection of national security or public order, health or morals or protection of the rights and freedoms of others, the scope of such permissible restrictions is extremely narrow and does not apply in the present case because the restriction of Mr. Hayit's expression was not necessary for the protection of an enumerated purpose. The vague factual allegations by the Government against Mr. Hayit failed to specify with any precision the nature of the threat posed by his expression of peaceful political dissent or his association with the Islamic Renaissance Party. To that end, the source asserts that the Government was instead using the veil of national security as a pretext to silence criticism and disband an opposition party.

26. The source also asserts that the detention of Mr. Hayit violates his right to participate in public affairs and political life, as enshrined under article 21 (1) of the Universal Declaration of Human Rights, article 25 (a) of the Covenant, as well as article 27 of the Tajik Constitution. The detention of Mr. Hayit was a direct response to his exercise of the right to participate in the conduct of public affairs as a member and leader of the opposition Islamic Renaissance Party. At the time of his arrest, he had been Deputy Chairman of the Party and had played a critical role in the party's political activities, including running for public office and making public remarks critical of the Government. Mr. Hayit had reportedly been vocal in his criticism of the Government and had publicly and aggressively opposed Government policies and corruption. The source alleges that his detention was part of a pattern of actions taken by the Government to punish political dissidents and chill political participation. Moreover, the effect of the judgment against Mr. Hayit was not only to punish him because of his past political participation, but also to hinder directly his future ability to exercise his right to political participation.

Violation of category III: due process rights

27. The source further asserts that the detention of Mr. Hayit is arbitrary under category III because the Government denied him his due process rights under international and domestic law.

28. According to the source, the Government violated the right of Mr. Hayit to privacy under article 12 of the Universal Declaration of Human Rights and article 17 of the Covenant by conducting warrantless searches of his home and by confiscating documents and items in the course of those searches.

29. The Government reportedly also violated article 9 (2) of the Covenant and principle 10 of the Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment by depriving Mr. Hayit of the right to be informed of the reason for the arrest or charges against him. In addition to not informing him of the charges against him for three days after his arrest, he and his lawyers were not provided with a full list of the legal bases of the charges brought against him for nearly five months. The Government provided neither Mr. Hayit nor his lawyers with access to the criminal complaint against him for several months, until shortly before the commencement of his trial. Prior to that time, he and his lawyers had thus been unable to confirm all the charges that had been brought against him.

30. Furthermore, the Government reportedly violated articles 9 (3)–(4) of the Covenant and principles 4, 11, 32 and 37 of the Body of Principles by denying Mr. Hayit the right to challenge the legality of his continued detention. The Government allegedly held him incommunicado and refused to let him challenge his detention from 16 to 19 September 2015, a time frame that exceeds the requirement that a detainee be brought "promptly" (within 48 hours) before a judge. The source alleges that the violation by Tajikistan of article 9 (3)–(4) enabled other violations, such as torture, to occur while he was being held without access to his attorney or family.

31. According to the source, the Government also denied Mr. Hayit his right to release pending trial under article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles by holding him in pretrial detention without the judge who adjudicated such detention having given any specific and individualized reasons for refusing his release on bail.

32. The Government further violated article 14 (3) (b) of the Covenant, principles 18–20 of the Body of Principles, rule 61 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and article 19 of the Tajik Constitution by denying Mr. Hayit prompt access to the counsel of his choosing and the ability to communicate with counsel in private. He was reportedly denied access to counsel for 10 days following his arrest and was thereafter never permitted to speak to his lawyers confidentially. In addition, the lawyers of Mr. Hayit were themselves harassed, with at least one being subsequently arrested.

33. The source also submits that the Government violated article 14 (3) (b) of the Covenant and principles 18 (2) and 11 (1) of the Body of Principles by failing to give Mr. Hayit and his lawyers adequate time and opportunity to prepare a defence. The lawyers of Mr. Hayit did not have access to the Government's complaint against him until less than 16 days before the trial. The defence lawyers were also denied pretrial access to any evidence, including witness lists, deemed classified by the Government.

34. According to the source, the Government also violated the right of Mr. Hayit to a public trial under article 14 (1) of the Covenant and article 10 of the Universal Declaration of Human Rights by trying him in a closed-door trial. The Government reportedly made no effort to explain how it was "necessary and proportionate" to exclude the public or to set up other mechanisms for observation that might have guaranteed the fairness of the proceedings.

35. The source further submits that the Government violated the right of Mr. Hayit to equality before the courts with an independent and impartial tribunal under article 14 (1) of the Covenant and article 19 of the Tajik Constitution. The trial of Mr. Hayit was allegedly conducted within a context where the President had nearly complete control over the

judiciary. The source asserts that virtually all of the information available regarding the trial of Mr. Hayit suggests that the proceedings were heavily weighted against him and his co-defendants, who were not afforded equal procedural rights to those of the prosecution: the defence team was not given full access to the prosecution's evidence; the defendants were presented to the court in shackles, bruised and bleeding from their forced run to the courthouse; the court allowed as evidence information that had been obtained through an illegal search and witness testimony, which was tainted by credible torture allegations; the court did not give any weight to the claim by a witness that he had been coerced into giving false testimony; the court denied the defence their motion to present expert witnesses, despite the fact that the prosecution was able to present its expert witnesses; and the court reached a guilty conviction despite a reported total lack of concrete links tying Mr. Hayit to the failed coup.

36. According to the source, the Government also violated the right of Mr. Hayit to a tribunal established by law under article 14 (1) of the Covenant when it tried Mr. Hayit, a civilian, under a specially constituted court presided over by the Chief Military Judge.

37. The Government reportedly further violated the right of Mr. Hayit to a presumption of innocence under article 14 (2) of the Covenant, article 11 (1) of the Universal Declaration of Human Rights, principle 36 of the Body of Principles and rule 111 (2) of the Nelson Mandela Rules when the President and State-owned media expressed certainty about the guilt of the members of the Islamic Renaissance Party prior to their trial. In addition, Mr. Hayit was presented to the court in shackles.

38. The source submits that the Government also violated the right of Mr. Hayit to examine witnesses under article 14 (3) (e) of the Covenant by denying his lawyers full access to the prosecution's witness list, thus preventing them from properly preparing for cross-examination. He was also not permitted to introduce his own expert witness.

39. According to the source, the Government violated the right of Mr. Hayit to freedom from torture and other cruel, inhuman, or degrading treatment or punishment under articles 7, 10 (1) and 14 (3) (g) of the Covenant, articles 1, 2 and 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the Universal Declaration of Human Rights, principles 1 and 6 of the Body of Principles, rule 1 of the Nelson Mandela Rules and article 18 of the Tajik Constitution. During his interrogations and subsequent detention, Mr. Hayit was allegedly subjected to beatings, resulting in broken bones and put in stress positions. Furthermore, he has been denied medical care, placed in solitary confinement, and subjected to substandard prison conditions.

40. Finally, the source submits that the Government violated the right of Mr. Hayit to a reasoned appeal under article 14 (5) of the Covenant, as there is no indication that the appellate review of his conviction included any meaningful engagement with the allegations or facts of his case. Rather, according to the source, the conclusion of the Supreme Court for every issue raised by Mr. Hayit on appeal was simply that his arguments were necessarily without foundation because they contradicted the allegations put forward by the Government, which the Supreme Court accepted at face value. There is also no indication that the Supreme Court considered whether the numerous procedural defects warranted reversal of the decision of the trial court.

Response from the Government

41. On 6 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 5 February 2018, detailed information about the current situation of Mr. Hayit and any comments on the source's allegations.

42. On 6 March 2018, the Working Group received a reply from the Government, which was subsequently transmitted to the source for its further comments. This reply was more than a month late, and the Working Group notes that the Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. Therefore, the Working Group cannot accept the reply as if it was presented in a timely manner.

43. However, the Working Group notes with appreciation the further comments submitted by the source on 21 March 2018 in response to the Government's reply.

Discussion

44. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

45. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

46. The source has submitted that Mr. Hayit's deprivation of liberty is arbitrary and falls under categories I, II and III. The Working Group shall consider these in turn.

47. The source argues that the detention of Mr. Hayit falls under category I as he was held incommunicado following his initial arrest. According to the source, Mr. Hayit was held for three days without access to a judge, unable to challenge the legality of his detention, and for 10 days without contact with the outside world, including his lawyer. The source also argues that the crimes that Mr. Hayit was charged with had been formulated in an overly vague manner in the Tajik Criminal Code, and this therefore cannot constitute a proper legal basis for his detention.

48. The Working Group observes that the Government in its late reply has not contested the fact that Mr. Hayit was arrested on 16 September 2015 and that it was only on 19 September 2015 that he was brought before a judge, who confirmed his pretrial detention. This was the first time that Mr. Hayit appeared before a judge. The Government claims that there was in fact only a 48-hour period from the moment of arrest until Mr. Hayit was presented to the judge for a pretrial detention hearing. The Working Group also notes that it was in the realm of the Government to specify the exact times of both the arrest and the appearance before the court, something that the Government failed to do in its late reply. The Working Group therefore concludes that the period must have exceeded 48 hours. As the Government claims, Mr. Hayit was arrested on 16 September, so even if this arrest took place late in the evening of that day, his appearance before the judge only on 19 September means that he would have been in custody for a period longer than 48 hours.

49. However, as the Human Rights Committee noted in its general comment No. 35 (2014) on liberty and security of person, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. The Working Group notes that the Government has not provided any such justifications but merely asserted that the period constituted 48 hours. The Working Group is unable to accept this assertion and thus finds a breach of article 9 of the Covenant.

50. Moreover, the Working Group observes that in its late reply the Government did not contest that the hearing on 19 September concerned the decision as to whether Mr. Hayit was to be remanded in custody. As such, this was not a hearing for the exercise of Mr. Hayit's right to challenge the legality of his detention.

51. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society. According to the Basic Principles and Guidelines, that right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty, applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or

psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes. Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.

52. In the present case, Mr. Hayit was held in detention for a period over 48 hours before he was brought in front of a judge, which was for a hearing on the application of pretrial detention. That means that, during those three days, Mr. Hayit was deprived of the possibility to challenge the legality of his detention. However, without the affirmation by the judiciary that the detention is indeed legal, the detention cannot be said to have a legal basis. The Working Group reiterates that the right to challenge the legality of detention belongs to everyone, a right which was denied to Mr. Hayit for the first three days of his detention.

53. The Working Group notes a further discrepancy between the submissions made by the source and by the Government in its late reply. The Government claims that a lawyer was appointed to Mr. Hayit on the day of his arrest, namely, on 16 September 2015, who was present during his interrogation on the same day. The source claims that Mr. Hayit was held without any contact with the outside world, including his lawyer, for the first 10 days.

54. In that respect, the Working Group notes that it was within the realm of the Government to provide the copies of the requisite documents that would certify the date Mr. Hayit was granted access to his lawyer, something that the Government failed to do in its late reply. The Working Group thus finds that there has been a denial of legal assistance in violation of article 14 (3) (b) of the Covenant, principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and principle 9 of the Basic Principles and Guidelines.

55. Moreover, the Government has failed to explain when Mr. Hayit was notified of the charges against him, and the Working Group must therefore accept the submission made by the source that such notification did not take place.

56. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only promptly informed of the reasons for arrest but also promptly informed of any charges against them. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted in its general comment No. 35, that right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.

57. In the present case, Mr. Hayit was held for three days before he appeared before a judge, who decided that he was to be remanded in custody. During that time, no formal charges were levied against him that would have legitimized his detention. This means that the Tajik authorities effectively did not formally invoke any legal basis justifying the detention of Mr. Hayit for three days. The Working Group therefore concludes that the detention of Mr. Hayit for three days without informing him of the charges and without presenting him before a judge to enable him to challenge the legality of his detention was arbitrary and falls under category I.

58. The source has also submitted that the detention of Mr. Hayit is arbitrary and falls under category II, as his detention was in breach of articles 19, 21, 22 and 25 of the Covenant. In its late reply, the Government has merely rejected those submissions, stating that Mr. Hayit was not prosecuted and sentenced for his political views or expressions but rather because of a plot to use violence to overthrow the constitutional make-up of Tajikistan. However, the Working Group notes that in its late reply the Government failed to specify what Mr. Hayit had done in pursuit of such an aim as there was no description of any actions undertaken by him that could be construed as such a plot.

59. The Working Group firstly notes that, as the Human Rights Committee has stated in its general comment No. 34 (2011) on the freedoms of opinion and expression, freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are

indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.

60. The Committee has further stated in the same general comment that the freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions. Moreover, the permitted restrictions to that right may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. The Committee went on to stipulate that restrictions are not allowed on grounds not specified in paragraph 3 of the general comment, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. It should be noted that article 21 of the Covenant permits restrictions to the right of assembly on the same three grounds.

61. In the present case, the Government of Tajikistan in its late response to the submissions made by the source has not invoked any of the permitted restrictions; it has cited a number of criminal acts allegedly committed by Mr. Hayit without any explanation as to what actions led to those violations. It is quite clear to the Working Group that the basis for the arrest and subsequent detention of Mr. Hayit was in fact his exercise of freedom of expression and freedom of assembly. The Government has alleged that Mr. Hayit had been involved in the protest that took place on 4 September 2015 and resulted in a number of deaths. However, when making such allegations the Government has provided no evidence in their support, and it appears to the Working Group that those allegations follow the pattern of harassment that Mr. Hayit had experienced for years prior to the events of September 2015.

62. While the freedom of expression and freedom of assembly are not absolute rights, the Human Rights Committee has stated in the above-mentioned general comment that, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Moreover, it stipulates that paragraph 3 of that general comment may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights.

63. Moreover, the Working Group also finds that the right of Mr. Hayit to take part in the conduct of public affairs as specified in article 25 of the Covenant has been violated since his arrest was directly linked to the fact that he had been a prominent member of the Islamic Renaissance Party. The Working Group recalls that the Human Rights Committee, in its general comment No. 25, has emphasized that citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. That participation is supported by ensuring freedom of expression, assembly and association. Noting the essential link between the rights to freedom of expression, assembly and association, the Committee also emphasizes that the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. The Government has presented no explanation how the actions of Mr. Hayit as a member of the Party had led to the commission of a specific crime, and the Working Group therefore also finds his arrest to be the result of his exercise of rights under article 25 of the Covenant.

64. The Working Group therefore concludes that Mr. Hayit was detained because of his exercising his freedom of expression, freedom of assembly and his right to take part in the conduct of public affairs, and therefore falls under category II.

65. Given its finding that the deprivation of liberty of Mr. Hayit is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Hayit should have taken place. However, the trial did take place, and the source has submitted that the detention of Mr. Hayit was arbitrary and falls under category III since: (a) his lawyers were not notified of the full charges against him for nearly five months; (b) his lawyers were only given two weeks to study the full accusations; (c) the trial was presided over by a

military judge; (d) his lawyers were not given access to the full list of witnesses, and Mr. Hayit was unable to call witnesses on his behalf; (e) he was subjected to beatings, resulting in broken bones, and put into stress positions during his interrogations and subsequent detention; (f) State media expressed certainty of his guilt before the final judgment; (g) he was presented to the court in shackles; (h) the trial took place behind closed doors; and (i) there was no public announcement of the reasoned judgment.

66. The Working Group observes that in its late reply the Government failed to address any of the submissions made by the source with the exception of noting that Mr. Hayit's lawyers had been provided with the opportunity to study the full case file from 28 December 2015 until 14 January 2016. The Working Group observes that this was a period of 18 days, during which there was a period of festivities in the State party. Article 14 (3) (b) of the Covenant requires that everyone charged with a criminal offence be given adequate time and facilities to prepare for a defence. The Working Group finds it difficult to accept that this was observed in the present case and that the time given to the defence was sufficient to study the charges in such a complex case where the accused faced over a dozen charges and the possibility of a life sentence. However, the source has also failed to explain whether the defence team submitted requests for more time to be provided and whether such requests were denied. Without such information, the Working Group is unable to conclude that there has been a breach of article 14 (3) (b).[1]

67. The Government in its late reply also rejected the allegation that Mr. Hayit had been subjected to beatings, resulting in broken bones, and put into stress positions during his interrogations and subsequent detention. The Government in its late reply noted that Mr. Hayit had been examined on 11 June 2017 by a medical doctor, who had found no evidence of any ill-treatment. The Working Group, however, points out that this examination took place nearly two years after Mr. Hayit's arrest and the interrogations with the alleged beatings. This is a considerable period of time that might have allowed any physical signs of ill-treatment to disappear. The Working Group notes the absence of any submissions on behalf of the Government in relation to the alleged treatment of Mr. Hayit in 2015.

68. In the view of the Working Group, the treatment described by the source would appear to reveal a prima facie breach of the absolute prohibition of torture and ill-treatment, which is a peremptory norm of international law, as well as of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 6 of the Body of Principles and rule 1 of the Nelson Mandela Rules. The Working Group also notes that the use of a confession extracted through ill-treatment that is tantamount if not equivalent to torture may also constitute a violation by Tajikistan of its international obligation under article 15 of the Convention against Torture. Furthermore, the Body of Principles specifically prohibits taking undue advantage of the situation of detention to commit confession or incriminating statements (see principle 21).[2] It is also a breach of article 14 (3) (g) of the Covenant. The Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

69. In addition, the Government has not responded to the submission made by the source that the lawyers of Mr. Hayit were not notified of the full charges for nearly five months, which means that the defence team probably learned of the full charges only when they were given access to the full file of the case. Such a situation cannot be reconciled with the obligations undertaken by Tajikistan under article 14 (3) (a) of the Covenant, which requires prompt and detailed notification of charges, and the Working Group thus finds that this provision has been violated.

70. Moreover, the Government also has not responded to the submission made by the source that Mr. Hayit's lawyers were not given full access to the list of witnesses, that he was prevented from bringing witnesses on his behalf and that his lawyers did not have full access to all the evidence deemed classified by the authorities. As the Human Rights

[1] See *Grant v. Jamaica* (CCPR/C/56/D/597/1994); and *Sawyers and McLean v. Jamaica* (CCPR/C/41/D/226/1987).

[2] See also opinions No. 48/2016, 3/2017, 6/2017 and 29/2017.

Committee states in paragraph 39 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, there is a strict obligation to respect the right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. In the present case, that right was denied to Mr. Hayit and such a refusal to allow witnesses on behalf of the defence bears the hallmarks of serious denial of equality of arms in the proceedings and is in fact a violation of article 14 (3) (e) of the Covenant. The Working Group is especially concerned at this violation, given that one of the witnesses recanted his testimony.[3]

71. Furthermore, the Working Group notes that the defence lawyers were denied full access to all the evidence deemed classified by the authorities, which was not explained by the Tajik authorities in the late reply. This is a serious violation of the principle of the right to equality of arms, under article 10 of the Universal Declaration of Human Rights and articles 14 (1) and 14 (3) (b) of the Covenant, and the rights to a fair hearing and to have adequate time and facilities for the preparation of the defence "in full equality".[4] Since the Government did not submit any information in response to the Working Group's regular communication, it has therefore not demonstrated why restricting access to classified information was necessary and proportionate in pursuing a legitimate aim, such as national security. It has also failed to demonstrate that less restrictive means, such as redacted summaries, providing copies of documents to Mr. Hayit and his lawyers for use within the authorized premises, or other means of accommodation, would have been possible to achieve the same result. The Working Group considers that the complete denial of access to classified evidence in this case is a violation of article 14 of the Covenant.

72. The Working Group is also concerned at the allegations of harassment that was sustained by the lawyers of Mr. Hayit and wishes to underline that it is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedies whenever a violation still occurs. The Working Group especially recalls that the Basic Principles and Guidelines state that legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment. In the view of the Working Group, this also constitutes a violation of article 14 (3) (b) of the Covenant. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

73. In its late reply, the Government has also not presented any explanation in relation to the submission made by the source that the trial of Mr. Hayit was presided over by a military judge. The Working Group observes that it is within its mandate to assess the overall proceedings of the court and the law itself to determine whether they meet international standards.[5] In relation to the jurisdiction of the military court, the Working Group has in its practice consistently argued that the trial of civilians by military courts is in violation of the Covenant and customary international law and that, under international law, military tribunals can only be competent to try military personnel for military offences.[6] Moreover, in the present case, the Government had the opportunity to explain the reasons for the trial being presided over by a military judge but has failed to do so.

74. The Government in its late reply has also failed to address the submissions made by the source that State media expressed certainty over the guilt of Mr. Hayit before the final judgment, and that he was presented to the court in shackles. The Working Group observes that the media should avoid news coverage undermining the presumption of innocence.[7] It notes that, in this particular case, it was the State media that reported on the alleged guilt of Mr. Hayit. It also notes that the Government has failed to provide any explanation as to

[3] See paragraph 12 above.

[4] See e.g. opinions No. 18/2018, paras. 52 and 53; 89/2017, para. 56; 50/2014, para. 77; 19/2005, para. 28 (b), in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant.

[5] See opinions No. 33/2015, No. 15/2017, No. 30/2017 and No. 78/2017.

[6] See A/HRC/27/48, paras. 67–68; and opinions No. 44/2016, No. 30/2017 and No. 78/2017.

[7] See Human Rights Committee general comment No. 32, para. 30.

what warranted the need to shackle Mr. Hayit during his court appearance. The Working Group therefore concludes that there has been a breach of article 14 (2) of the Covenant.

75. Furthermore, the Government has also not provided any explanation to the submissions made that the trial of Mr. Hayit took place behind closed doors. As the Human Rights Committee states in paragraph 29 of its general comment No. 32:

> Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons.

76. The Working Group notes that the case of Mr. Hayit clearly did not fall into any of the prescribed exceptions to the general obligation of public trials under article 14 (1) of the Covenant, and the Government of Tajikistan had not invoked any of those exceptions to justify the closed trial. The Working Group thus finds a violation of article 14 (1) of the Covenant.

77. The Working Group further notes that the failure to provide a public, reasoned judgment in the case of Mr. Hayit constitutes a breach of article 14 (5) of the Covenant, as it effectively prevents the prospective appellant from enjoying the effective exercise of the right to appeal.[8]

78. In sum, the Working Group finds that the trial of Mr. Hayit was carried out in total disregard for the guarantees encapsulated in article 14 (1), (2), (3) (a), (e) and (g) and (5) of the Covenant, and that those violations were of such gravity as to give the deprivation of liberty of Mr. Hayit an arbitrary character (category III).

Disposition

79. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Haritos Mahmadali Rahmonovich Hayit, being in contravention of articles 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

80. Consequent upon the opinion rendered, the Working Group requests the Government of Tajikistan to take the steps necessary to remedy the situation of Mr. Hayit without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

81. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hayit immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

82. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hayit, and to take appropriate measures against those responsible for the violation of his rights.

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on independence of judges and lawyers and the Special Rapporteur on torture, for appropriate action.

[8] Ibid, para. 49.

Follow-up procedure

84. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hayit has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Hayit;

(c) Whether an investigation has been conducted into the violation of Mr. Hayit's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Tajikistan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

85. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

86. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

87. The Government should disseminate through all available means the present opinion among all stakeholders.

88. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[9]

[*Adopted on 17 April 2018*]

[9] See Human Rights Council resolution 33/30, paras. 3 and 7.